



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1994

Mr. Daniel Hernandez
Assistant General Counsel
The Texas A&M University System
State Headquarters Bldg.
301 Tarrow, 6th Floor
College Station, Texas 77843-1230

OR94-817

Dear Mr. Hernandez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26663.

The Texas A&M University System ("TAMUS") has received a request for the following information:

- 1) All internal reports pertaining to Timothy Shaunty and his expense accounts and reimbursement payments. The report compiled by Frank Clark's office and presented to James Bond and/or other officials which was then turned over to the Brazos County District Attorney's Office.
- 2) Correspondence between Mr. Timothy Shaunty, his attorney and Texas A&M University officials reflecting his responses to the audit findings and any other correspondence addressing the issue raised in the audit and Mr. Shaunty's subsequent termination.
- 3) Any other correspondence, documents, letters, and/or reports pertaining to the termination of Mr. Shaunty in his appeal of that termination.

You explain that Mr. Shaunty is a former Chief of Legislative Staff for TAMUS whose employment was terminated March 31, 1994. You further explain that Mr. Shaunty, through his attorney, had appealed his termination and was involved in

arbitration with TAMUS. However, by letter dated June 3, 1994, Mr. Shaunty's attorney advised TAMUS that Mr. Shaunty decided not to continue with the nonbinding arbitration "to conserve his time, energy, effort and expense on other avenues that will not be subject to the ultimate decision of A&M Administrators" Since the date of that letter, Mr. Shaunty has not filed a lawsuit against the university.

You believe that the requested information is excepted from required public disclosure. You contend that section 552.103 of the Government Code authorizes TAMUS to withhold the information requested in item 1 from required public disclosure. You further contend that the attorney-client privilege, which you believe sections 552.101 and 552.107 incorporate into the Open Records Act, excepts the information requested in items 2 and 3 from required public disclosure. You correctly submitted to this office copies of the requested information for our review. *See* Gov't Code § 552.303 (requiring governmental body that requests attorney general's decision as to availability of particular information under Open Records Act to submit to attorney general specific information requested); *see also* Open Records Decision No. 195 (1978) at 2 (stating that governmental body's failure to supply copies of requested information to attorney general results in presumption that information is public).

Section 552.103(a) of the Government Code authorizes a governmental body to withhold from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990).

Given the context in which Mr. Shaunty's attorney stated that Mr. Shaunty intended to pursue "other avenues that will not be subject to the ultimate decision of A&M administrators," we believe you have demonstrated that TAMUS reasonably may anticipate litigation. *See* Open Records Decision No. 555 (1990) at 3. We therefore conclude that TAMUS may withhold the information requested in item 1 from the requestor. In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation previously has not accessed the records at issue; absent special circumstances, once all parties to the litigation have, *e.g.*, through discovery or otherwise, obtained information, no section 552.103(a) interest exists with respect to that

information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, TAMUS cannot justify withholding the information from the requestor pursuant to section 552.103(a). We also note that section 552.103(a) applies only until the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You believe that the attorney-client privilege excepts the information requested in items 2 and 3 from required public disclosure. Although, prior to 1990, this office often cited the statutory predecessor to section 552.101 of the Government Code to except from disclosure information within the attorney-client privilege, section 552.107 more specifically incorporates the privilege.¹ See Open Records Decision No. 574 (1990) at 2. Section 552.107(1) excepts from required public disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas."

This office examined the scope of the attorney-client privilege, as it was incorporated into the statutory predecessor to section 552.107(1), in Open Records Decision No. 574 (copy enclosed). In Open Records Decision No. 574, this office concluded that, for purposes of the Open Records Act, the statutory predecessor to section 552.107(1) protected only material considered privileged under rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct; it did not extend to material considered unprivileged client information under rule 1.05. Open Records Decision No. 574, at 5. Thus, the statutory predecessor to section 552.107(1) excepted from required public disclosure only factual information or requests for legal advice communicated by the client to the attorney, as well as legal advice or opinion the attorney renders to the client or to an associated attorney in furtherance of the rendition of legal services to the client. *Id.* at 3, 5. The statutory predecessor to section 552.107(1) did not except basically factual communications from attorney to client or between attorneys representing the client that do not reveal client confidences. *Id.*

We have reviewed the information you have submitted as responsive to items 2 and 3. Much of it you have labelled as "unprivileged." Furthermore, we have examined the information you have labelled "unprivileged," and we have found that it does not contain client confidences or legal advice or opinion in the furtherance of the rendition of legal services to the client. Consequently, in accordance with Open Records Decision No. 574, we conclude that section 552.107(1) does not authorize TAMUS to withhold this unprivileged information from the requestor.

¹Additionally, this office stated in Open Records Decision No. 575 (1990) at 2 that the statutory predecessor to section 552.101 of the Government Code does not encompass discovery privileges; rather, the decision stated, "Such information is 'privileged' only to the extent that the court in a particular case deems it to be so."

Of the remaining information you have submitted as responsive to items 2 and 3, which you have classified as "privileged," we find that only a portion of the information consists of client confidences or legal advice or opinion in furtherance of the rendition of legal services to the client. For your convenience, we have marked the information that TAMUS may withhold under section 552.107(1). TAMUS must release to the requestor the remaining information requested in items 2 and 3.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LRD/rho

Ref: ID# 26663

Enclosures: Open Records Decision No. 574 (1990)
Marked documents

cc: Ms. Olive Talley
Staff Writer
The Dallas Morning News
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202-2711
(w/o enclosures)

²We note that many of the documents have been stamped "confidential." For purposes of the Open Records Act, a document is not confidential unless it is made confidential by law, either statutory, constitutional, or judicial decision. See Gov't Code § 552.101. Unless a governmental body is authorized by law to deem documents confidential, it may not promise confidentiality. Attorney General Opinion H-258 (1974) at 3; see also Attorney General Opinions JM-672 (1987) at 1-2; JM-37 (1983) at 2; Open Records Decision Nos. 594 at 3, 585 at 2 (1991); 514 (1988) at 1; 55A (1975) at 2. Similarly, unless a governmental body is statutorily authorized to do so, it may not deem a document confidential simply by identifying the document as confidential. See Open Records Decision Nos. 575 at 3, 559 at 2 (1990).